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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA,)	CR 14-00175 TEH
)	
Plaintiff,)	UNITED STATES' MEMORANDUM OF POINTS
)	AND AUTHORITIES IN SUPPORT OF MOTION
v.)	FOR RULE 17 SUBPOENAS
)	
PACIFIC GAS AND ELECTRIC COMPANY,)	
)	
Defendant.)	
)	

The United States submits this Memorandum of Points and Authorities in support of its Motion for Issuance of Subpoenas *Duces Tecum* pursuant to Federal Rule of Criminal Procedure 17(c)(1) and Local Rules 17-2(a)(1) and 47-3.

In order to grant a Rule 17(c) motion for the issuance of a criminal pretrial subpoena *duces tecum*, the moving party must demonstrate:

(1) that the documents are evidentiary and relevant; (2) that they are not otherwise procurable reasonably in advance of trial by exercise of due diligence; (3) that the party cannot properly prepare for trial without such production and inspection in

advance of trial and that the failure to obtain such inspection may tend unreasonably to delay the trial; and (4) that the application is made in good faith and is not intended as a general fishing expedition.

United States v. Krane, 625 F.3d 568, 574 (9th Cir. 2010) (citing *United States v. Nixon*, 418 U.S. 683, 699-700 (1974)).

The United States moves for issuance of subpoenas *duces tecum* pursuant to Federal Rule of Criminal Procedure 17(c) to law firms and attorneys representing PG&E's current and/or former employees and contractors for the following documents:

A. For the following individuals, (1) all non-privileged records and communications regarding retention for representation; and (2) all billing records, including non-privileged time entries, relating to *United States v. Pacific Gas and Electric Company* (CR 14-00175) or any investigation by the U.S. Attorney's Office for the Northern District of California related to PG&E. If any responsive documents within the scope of this subpoena are withheld on the basis of a claimed privilege, please provide a privilege log describing the basis for withholding any responsive document, including on the basis of attorney-client privilege.

<u>Witness:</u>	<u>Subpoena Recipient:</u>
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Under the four-part test set forth in *Krane* and *Nixon*, the subpoenas are both evidentiary and relevant. The records sought will allow the United States to demonstrate potential bias of PG&E employees and contractors, both current and former, who may be witnesses at trial. *See* Declaration of Jeff Schenk (Schenk Dec.) at ¶ 2. Impeachment material may be obtained through Rule 17(c) subpoenas. *United States v. Johnson*, 2014 WL 60680898, *2 (N.D. Cal. 2014) (quoting *United States v. Nixon*, 418 U.S. 683, 702 (1974)); and *United States v. Martinov*, 2012 WL 3987329, *2 (N.D. Cal. 2012). The type of records sought here, billing and retention records, are not privileged; and any portion of them that reveals specific research or litigation strategy may be redacted before being produced. *Clarke v. Am. Commerce Nat. Bank*, 974 F.2d 127, 130 (9th Cir. 1992). Additionally, on March 3, 2016, six witness counsels objected to the government's previous Rule 17 subpoena, seeking similar retention records from PG&E. Schenk Dec. at ¶ 2. From that objection, we may reasonably conclude witness-counsel will not voluntarily provide these documents to the government.

The United States intends to seek the return of the subpoenas no later than fourteen days from their issuance. The United States will provide any documents it obtains as a result of the subpoenas to defense counsel if the United States intends to use the documents at trial or if the documents contain exculpatory information or are otherwise discoverable. The Attachment for the proposed subpoenas are

1 attached as Exhibit 1 to the Declaration of Jeff Schenk submitted in support of this Motion. Schenk
2 Dec. at ¶ 3.

3 Based on the facts and argument set forth above, the United States respectfully requests that the
4 Court find the United States has demonstrated, under *Krane* and *Nixon*, that the Rule 17(c) request for
5 issuance of subpoenas in advance of trial is not a fishing expedition, but that the documents sought are
6 evidentiary, relevant, and needed in preparation for the upcoming trial and cannot otherwise be
7 reasonably procured in advance of trial; and thereby, grant this Motion for the Issuance of Subpoenas
8 Duces Tecum.

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10 DATED: March 8, 2016

Respectfully submitted,

11 BRIAN J. STRETCH
12 Acting United States Attorney

13 /s/

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JEFF SCHENK
Assistant United States Attorney